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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THOMAS ABBE et al., Plaintiffs and Appellants, v. SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM et al., Defendants and Respondents.	D066632 (Super. Ct. Nos. 7-2011-00096899-CU-PO-CTL, 37-2011-00101161-CU-NP-CTL)

APPEAL from judgments of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

Smith, Steiner, Vanderpool & Wax, Ann M. Smith and Kathryn A. Schultz for Plaintiffs and Appellants.

Jan I. Goldsmith, City Attorney, and Walter C. Chung, Deputy City Attorney, for Defendant and Respondent City of San Diego.

Kirby Noonan Lance & Hoge, David J. Noonan, Steven W. Sanchez and Micaela P. Banach, for Defendant and Respondent The Board of Administration of the San Diego City Employees' Retirement System.

In 2010 this court concluded that the San Diego City Employees' Retirement System (SDCERS) acted unlawfully in deciding to charge the City of San Diego (City) for a shortfall in funding of pension service credits purchased by City employees during the period August 15, 2003, to November 1, 2003. (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69 (*City of San Diego* or the *City of San Diego* Opinion).) As a result, SDCERS voted in 2011 to require the employees who purchased those pension service credits to make up the funding shortfall. The impacted employees (Employees) then filed lawsuits against the City and SDCERS, including the two lawsuits at issue in this appeal.[1]

Employees contend (1) that the trial court erred in sustaining the demurrers filed by SDCERS and the City to the Employees' cause of action seeking equitable relief, on the basis of extrinsic fraud, from the judgment we affirmed in the *City of San Diego* Opinion; and (2) the trial court erred in ruling that summary judgment was warranted in favor of SDCERS, on the basis of statutory immunity, on two causes of action alleging that SDCERS breached its fiduciary duties to Employees.

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1 Appeals in the three other lawsuits filed against SDCERS as a result of SDCERS's decision in 2011 to require employees to make up the funding shortfall for pension service credits are considered separately in case No. D066678, *Baidya v. San Diego City Employees' Retirement System*.

We conclude that Employees' arguments lack merit, and accordingly we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The City's Pension System*

We begin with the general background of the City's pension system, relying on our Supreme Court's summary of that system in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 (*Lexin*). "San Diego is a charter city. It maintains a pension plan for its employees, the San Diego City Employees' Retirement System (SDCERS). (San Diego City Charter, art. IX, § 141; San Diego Mun. Code, § 24.0101.) SDCERS is a defined benefit plan in which benefits are based upon salary, length of service, and age. (San Diego Mun. Code, §§ 24.0402–24.0405.) The plan is funded by contributions from both the City and its employees. (San Diego City Charter, art. IX, § 143; San Diego Mun. Code, § 24.0402.)" (*Lexin*, at p. 1063.)

"The pension fund is overseen by a 13-member board of administration (SDCERS Board or Board). (San Diego City Charter, art. IX, § 144.) Although established by the City, the Board is a separate entity. (*Ibid.*; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 571.) The SDCERS Board is a fiduciary charged with administering the City's pension fund in a fashion that preserves its long-term solvency; it must ensure that through actuarially sound contribution rates and prudent investment, principal is conserved, income is generated, and the fund is able to meet its ongoing disbursement obligations. (Cal. Const., art. XVI, § 17; San Diego City Charter, art. IX, § 144.)

Consistent with that central mission, the SDCERS Board has a range of ancillary obligations, including but not limited to providing for actuarial services, determining member eligibility for and ensuring receipt of benefits, and minimizing employer contributions. (Cal. Const., art. XVI, § 17, subds. (b), (e); San Diego City Charter, art. IX, §§ 142, 144; San Diego Mun. Code, § 24.0901.) To carry out these duties, the Board is granted the power to make such rules and regulations as it deems necessary. (San Diego City Charter, art. IX, § 144; San Diego Mun. Code, §§ 24.0401, 24.0901; see generally *Bianchi*, at p. 571; *Grimm v. City of San Diego* (1979) 94 Cal.App.3d 33, 39-40.)" (*Lexin*, *supra*, 47 Cal.4th at pp. 1063-1064.)

B. *The Genesis of the Underfunding of the Pension Service Credit Program*

The specific facts concerning the underfunding of the pension service credits (PSC) at issue in this litigation are set forth the *City of San Diego* Opinion, as follows. "In 1993 the City established the purchase of service credit program . . . to allow employees to purchase service credits for periods of actual service or authorized leaves of absence that were otherwise ineligible for service credits. . . . [¶] In 1997 the PSC [program] was expanded to include the purchase of service credits for periods that were not actually worked[,] . . . allowing employees to purchase up to five years of general service credit in addition to any other specific credit for which they were eligible (such as military service, approved leaves of absence, and part-time employment). . . . [¶] It is undisputed that from its inception the PSC program was to be cost neutral to the City. In a 1996 memorandum from the City to SDCERS, proposing to retain elements of the original PSC [program] and adding the five-year purchase of service credit feature

enacted in 1997, the City emphasized that employees 'would pay into the retirement fund an amount, including interest, equivalent to the employee and employer full cost of such service.' " (*City of San Diego, supra*, 186 Cal.App.4th at pp. 73-74.)

"[I]n 1997, SDCERS's actuary advised the [B]oard that a two-tiered rate structure, 15 percent for general member employees and 26 percent for safety member employees [for each year purchased], would be sufficient to meet the requirement that the purchase price for service credits paid by employees be equivalent to the employer and employee cost. SDCERS's [B]oard approved the rate structure at its March 1997 meeting. City employees were then permitted to purchase service credits at the rates the [B]oard established. [¶] . . . [¶] Between 1997 and 2002, the City amended the [San Diego Municipal Code] sections governing general member employees' retirement allowance three times and safety member employees' twice. On each occasion, the City made increased retirement factors that were retroactive, i.e., applicable to past years of creditable service. This caused an increase in the value of years of service employees had purchased under the PSC program based upon the rates the [B]oard set in 1997." (*City of San Diego*, *supra*, 186 Cal.App.4th at pp. 74-75.)

"In August 2002 the [B]oard directed its actuary to evaluate whether the PSC rate structure set in 1997 reflected the current employer and employee costs of the benefit. The actuary completed his study in August 2003 and recommended to the [B]oard the rates be adjusted upwards to 27 percent for general member employees and 37 percent for safety member employees. In doing so, the actuary noted the 1997 rates were outdated because 'they were set by the Board prior to certain benefit increases. . . .' [¶] . . . [¶] At

a meeting on August 15, 2003, the [B]oard discussed the actuary's proposed PSC price increase. . . . The [B]oard approved the increased pricing, but allowed the 60-day window for employees to purchase credits under the old pricing methodology." (*City of San Diego, supra,* 186 Cal.App.4th at pp. 75-76.)

"After that meeting SDCERS sent a notification to all City employees telling them that PSC purchase applications received by SDCERS before November 1, 2003, would be priced under the old rates — 15 percent for general member employees and 26 percent for safety members. During that 60-day window, 5,726 years of service were purchased by 1,609 general members, and 828 years [were] purchased by 412 safety member employees. During this 60-day window, general member employees purchased more years than they had purchased since the PSC [program] inception in 1997. Safety member purchases nearly doubled the amount purchased in previous years." (*City of San Diego, supra,* 186 Cal.App.4th at p. 76.)

C. *Litigation over the City's Pension Benefits Prior to 2007*

As relevant here, the City and SDCERS were involved in litigation from 2005 to 2007 over pension benefits. The litigation arose in June 2005 when City Attorney Michael J. Aguirre asserted that certain pension benefits authorized by the City council were illegal and demanded that the City auditor and comptroller direct SDCERS to stop paying them. According to Aguirre, those purportedly illegal benefits included, among a long list of items, " '[a]ny retirement benefit based on a Purchase of Service Credit that was purchased by a member at a rate that was not actuarially neutral.' " SDCERS filed a declaratory relief action against the City in July 2005, seeking a judicial determination of

the legality of the pension benefits, and in a consolidated action, the City filed a series of cross-complaints against SDCERS and others concerning the City's pension benefits. (*San Diego City Employees' Retirement System v. San Diego City Attorney Michael J. Aguirre*, GIC841845, Super. Ct. San Diego County, consolidated with GIC851286 and GIC852100) (the *Aguirre* litigation).) Among other things, the trial court in the *Aguirre* litigation ruled in connection with SDCERS's declaratory relief action in 2006 that "SDCERS could continue to pay certain retirement benefits unless, and until[,] such benefits were declared illegal." Judgment was entered on the City's cross-complaint in September 2007, and final judgment in all of the consolidated actions was entered in November 2010.

D. *The SDCERS Board's November 16, 2007 Vote*

Meanwhile, Aguirre wrote to SDCERS in February 2007 pointing out that the PSC program was not cost neutral to the City and threatening to institute litigation if SDCERS did not "cooperate with the City in terminating" the PSC program and rectify past alleged breaches of fiduciary duty by the SDCERS Board with respect to the administration of that program. Aguirre took further action with respect to the PSC program in August and September 2007 when he requested that the City council rescind the PSC program or reduce the value of the service credits.

In the midst of Aguirre's attack on the PSC program and his threat of litigation, the SDCERS Board turned its attention to that program and considered taking action. As we explained in *City of San Diego*, "[i]n August 2007 SDCERS's actuary informed SDCERS that its non-cost neutral pricing of PSC credits accounted for $146 million of the

unfunded actuarial liability of SDCERS. [¶] At an October 2007 public meeting of the SDCERS [B]oard, SDCERS's fiduciary counsel informed the [B]oard that they had the '1. Duty to preserve and protect the fund; to pay benefits that are promised and earned and *collect sufficient contributions to support the benefits.* 2. Duty to *correct errors when appropriate and not perpetuate erroneous interpretations of the plan*.' (Italics added.) The fiduciary counsel opined that SDCERS could legally take several courses of action to remedy the underfunding, including 'voiding contracts,' 'collecting arrears payments,' 'offering rewritten contracts,' 'spreading out additional payments,' 'reducing benefit levels,' and 'continuing to collect the shortfall through the amortization of the system's unfunded liability.' [¶] At a meeting on November 16, 2007 (November 16 meeting), the [B]oard decided to charge the City for the unfunded liability. SDCERS's [B]oard voted unanimously to 'continue to amortize the shortfall through the existing unfunded actuarial liability.' In lay terms, the [B]oard voted to charge the City for the underfunding." (Hereafter, November 16 meeting.) (*City of San Diego, supra*, 186 Cal.App.4th at pp. 76-77.)[2] On November 16, 2007, the SDCERS Board publicly

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2 As explained in Employees' complaints, SDCERS performed an annual actuarial valuation that tracked the amount of pension system losses or funding deficiencies, including underfunding associated with the PSC program. On an annual basis, the pension system's net actuarial losses were calculated and then amortized and added to the City's annual required contribution to SDCERS in accordance with San Diego Municipal Code section 24.0801, which states that "[a]ll deficiencies that occur due to the adoption of any retirement ordinances must be amortized over a period of 30 years or less." For example, as Employees allege, in January 2007, SDCERS's actuary transmitted to SDCERS the annual actuarial evaluation for the plan year ending June 30, 2006, which established the City's actually required contribution to SDCERS for fiscal year 2008, including $1.2 million in losses related to the PSC program. At the November 16

reported the vote that it took in closed session earlier in the day at the November 16 meeting, explaining that it believed the decision was "the most prudent and responsible action to take under the totality of the circumstances."

E. *The City Files a Petition for Writ of Mandate Against SDCERS, Leading to the* City of San Diego *Opinion*

"Four days after the [B]oard's November 16 meeting, the City filed a verified petition for writ of mandate, seeking an order commanding SDCERS to 'set aside its . . . November [16], 2007 action in full; and . . . take no further action absent full compliance with [the applicable municipal law]' " (the *City of San Diego* Action). (*City of San Diego*, *supra*, 186 Cal.App.4th at p. 77). "Thereafter, the City filed a first amended petition, which limited its scope to setting aside the November 16 vote as to 'all persons who have not yet retired as of the date the petition in this matter was first filed.' " (*Ibid*.) The trial court in the *City of San Diego* Action ruled that " '[i]t was unlawful to charge City for the shortfall that resulted for the service credits that were purchased between the establishment of new rates in August 2003 and November 1, 2003 . . .' " and ordered that the [B]oard's November 16, 2007 vote be set aside. (*Id*. at p. 78.)

In the *City of San Diego* Opinion, we affirmed the trial court's decision and concluded that "SDCERS's decision to charge the City for the underfunding of the PSC [program] between August 15 and November 1, 2003, was unlawful." (*City of San Diego*, *supra*, 186 Cal.App.4th at p. 82.) We explained that municipal law provided that

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meeting, the SDCERS Board voted to continue to include the underfunding of the PSC program in its annual calculation of the amount that the City would be required to amortize, and thereby to continue to require the City to fund the shortfall.

an employee purchasing service credits must pay the total cost of those credits, and "City employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*Ibid.*)[3] Because "the enabling legislation passed by the City for purchase of service credits specifically dictated that the total cost of such purchases would be borne by the employees," "[c]harging the City for SDCERS's underfunding exceeded SDCERS's authority as it was in violation of this legislation and exceeded its powers to administer retirement benefits." (*City of San Diego*, at pp. 79-80.) "The scope of the [B]oard's power as to benefits is limited to administering the benefits set by the

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3 Specifically, as explained in the *City of San Diego* Opinion, the relevant municipal law provisions are as follows. "[San Diego Municipal Code s]ection 24.1312 states: 'Any Member may purchase a maximum of five years of Creditable Service, in addition to any other Creditable Service the Member is eligible to purchase under this Division. The cost of Creditable Service purchased under [San Diego Municipal Code]section 24.1312 is the amount the Board determines to be the *employee and employer cost* of that Creditable Service.' (Italics added.) [¶] . . . [¶] [San Diego Municipal Code] section 24.0205, applicable to general member employees, and [San Diego Municipal Code] section 24.0305, for safety member employees, states that subject to the rules and regulations prescribed by SDCERS, any member may elect to make additional contributions at rates in excess of his/her normal contributions for the purpose of providing additional benefits. These sections of the [San Diego Municipal Code] state that City shall *not* be liable for any additional contributions for said purchases: 'The exercise of this privilege by a . . . member *shall not require the City to make any additional contributions.*' ([San Diego Mun. Code,]§ 24.0305[,] italics added.) [¶] . . . [¶] City Charter, article IX, section 143 (Charter section 143), states that employees who contribute extra money for their pensions are only 'entitled to receive the *proportionate* amount of increased allowances paid for by such additional contributions.' (Italics added.) With regard to the City's obligation toward its employees' pensions, Charter section 143 also states that the City 'shall contribute annually an amount substantially equal to that required of the employees for normal retirement allowances, as certified by the actuary, but *shall not be required to contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employees.*' (Italics added.)" (*City of San Diego*, *supra*, 186 Cal.App.4th at p. 74.)

City. When the [B]oard decided to charge the City for the underfunding, that decision was in violation of the law and thus exceeded its power." (*Id.* at p. 80.)

F. *The SDCERS Board Responds to the* City of San Diego *Opinion by Adopting Rule 4.90*

In response to our conclusion in the *City of San Diego* Opinion that it was unlawful for SDCERS to charge the City for the underfunding of the PSC program, the SDCERS Board adopted "Board Rule 4.90" (Rule 4.90) in November 2010.

Rule 4.90 applied to City employees who purchased service credits in the PSC program during the window period beginning August 15, 2003, but who had not retired from City service as of November 19, 2007. It set forth a number of options for the affected employees, under which the employees would bear the entire cost of funding the service credits.[4] The options for the affected employees to choose from included: (1) rescinding the service credit purchase and receiving a refund; (2) requesting that the service credits purchased be reduced to the amount of credits that could have been purchased by the employee's contributions had the credits been priced at the higher post-window period rates; or (3) paying, with interest, the difference between the price of the service credits at the window period rate and the amount that those service credits were priced at the post-window period rate.

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4 Rule 4.90 also gave the City the option of deciding within 60 days to voluntarily pay for some or all of the underfunding of the service credits. The City elected *not* to voluntarily pay any of the underfunding.

G. *Employees File the Instant Litigation Against SDCERS and the City*

In August 2011, a group of employees affected by Rule 4.90 filed a complaint against SDCERS and the City. (*Abitria v. San Diego City Employees' Retirement System*, No. 37-2011-00096899-CU-PO-CTL (*Abitria*).) In December 2011, a second group of employees affected by Rule 4.90 filed a complaint against SDCERS and the City that was identical to the complaint filed in *Abitria*. (*Abbe v. San Diego City Employees' Retirement System*, No. 37-2011-00102161-CU-NP-CTL (*Abbe*).) *Abitria* and *Abbe* were assigned to the same trial court judge.

The original complaints in *Abitria* and *Abbe* alleged the following causes of action: (1) equitable relief against judgment in the *City of San Diego* Action, based on extrinsic fraud, asserted against SDCERS and the City, which sought relief from the judgment in the *City of San Diego* Action based on purported extrinsic fraud by the City; (2) aiding and abetting SDCERS's violation of San Diego Municipal Code section 24.1312, asserted against the City; (3) aiding and abetting SDCERS's breach of fiduciary duty, asserted against the City; (4) six causes of action for breach of fiduciary duty, asserted against SDCERS, based on six different instances of alleged misconduct; and (5) breach of contract, asserted against SDCERS.

SDCERS and the City each filed demurrers to the causes of action in the original complaints in both actions. As relevant here, the trial court sustained the City's and SDCERS's demurrers to the cause of action for equitable relief against judgment in both *Abbe* and *Abitria* without leave to amend. In its ruling sustaining the demurrer on the cause of action for equitable relief against judgment, the trial court explained that the

facts pled by Employees described intrinsic, rather than extrinsic, fraud. The trial court sustained SDCERS's demurrer to certain other causes of action without leave to amend, but it overruled SDCERS's and the City's demurrers to other causes of action or sustained the demurrers with leave to amend.

Employees filed first amended complaints in both *Abitria* and *Abbe*, and the trial court sustained subsequent demurrers brought by SDCERS and the City, which challenged certain causes of action in those complaints.

As a result of the ruling on the demurrers, two causes of action remained against SDCERS and no causes of action remained against the City. Employees filed second amended complaints in *Abitria* and *Abbe* reflecting their remaining causes of action.

In the second amended complaints, the first cause of action alleged that SDCERS breached its common law and constitutional fiduciary duty by taking action at the November 16 meeting to reaffirm its practice of charging the City for the underfunding of the PSC program, which allegedly served to restart an expired statute of limitations period. The second cause of action in the second amended complaints alleged that SDCERS breached its common law and constitutional fiduciary duty by failing to raise certain affirmative defenses in the *City of San Diego* Action. Employees alleged that SDCERS would have been successful if it had raised those defenses and, as a result, the *City of San Diego* Opinion would never have issued, precluding the eventual adoption of Rule 4.90.

After the second amended complaints were filed, *Abitria* and *Abbe* were consolidated for purposes of discovery and trial.[5] SDCERS filed a single summary judgment motion that applied to both of the complaints.

The trial court granted the summary judgment motion. Specifically, the trial court ruled that both causes of action for breach of fiduciary duty were barred by the statutory immunity applicable to public entities under the Government Claims Act (Gov. Code, § 810 et seq.).

II

DISCUSSION

A. *The Demurrers to the Cause of Action for Equitable Relief Against Judgment*

We first consider Employees' contention that the trial court erred in both *Abitria* and *Abbe* by sustaining the demurrers brought by SDCERS and the City against the causes of action for equitable relief against judgment.

1. *Standard of Review*

" 'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada*

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5 The consolidation order also included three other San Diego Superior Court cases: *Baidya v. San Diego City Employees' Retirement System*, No. 37-2011-00096237-CU-PO-CTL; *Lancaster v. San Diego City Employees' Retirement System*, No. 37-2011-00096238-CU-PO-CTL; and *Lenhart v. San Diego City Employees' Retirement System*, No. 37-2011-00096587-CU-BC-CTL. As we have explained, appeals from those three cases are under a separate appellate docket number — case No. D066678, *Baidya v. San Diego City Employees' Retirement System*.

Investors v. City of Capitola (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, citations omitted.)

2. *The Relevant Allegations*

The causes of action for equitable relief against judgment, which are identical in the *Abitria* and *Abbe* complaints, are directed at obtaining relief from the judgment in the *City of San Diego* Action. Specifically, Employees focus on a stipulation that the City and SDCERS entered into during the early stages of the *City of San Diego* Action, which they alleged was obtained by the City's extrinsic fraud toward SDCERS or the trial court.

As background, Employees allege that Aguirre filed the petition for writ of mandate in the *City of San Diego* Action without the approval of the City council because he did not comply with the requirement in the City Charter which gives the City attorney the authority to file a petition for writ of mandamus only "upon order of the [City

c]ouncil" (San Diego City Charter, art. V, § 40). SDCERS demurred to the petition on the ground that Aguirre exceeded his authority in filing the petition without an order from the City council.

Before the trial court ruled on the demurrer, Aguirre met with the City council in closed session on April 15, 2008, to consider whether to authorize Aguirre's filing of the *City of San Diego* Action. Four council members voting in favor of authorizing the litigation, and one member voting against it. Although the City council had eight members, four members recused themselves due to conflicts of interest resulting from their purchase of service credits. One of the four recused council members was randomly chosen to participate, with the result that five council members cast votes.

The City Charter, states that "[n]o resolution, ordinance or other action of the Council shall be passed or become effective without receiving the affirmative vote of five members of the Council, unless a greater number is otherwise required by the Charter or other superseding law." (City Charter, art. XV, § 270(c).) In the instant situation, although the four-to-one vote to authorize Aguirre's writ petition was an affirmative vote by the majority of the five participating council members, it was not an affirmative vote of at least five members of the City council.

On April 21, 2008, the result of the April 15, 2008 vote was publicly reported by Executive Assistant City Attorney Donald McGrath, with a statement that the City council had authorized the filing of *City of San Diego* Action on a four-to-one vote, but

that "whether the 4-to-1 vote is binding on City is a legal question that may need to be resolved by a court."[6]

Three days later, on April 24, 2008, the City and SDCERS filed a stipulation with the trial court in the *City of San Diego* Action, stating: "The City Attorney met with the City Council in closed session on April 15, 2008, to discuss this instant matter. During that closed session, the City Council authorized the City Attorney to maintain this action. Following the action of the City Council, the City discussed with counsel for SDCERS whether or not they would be amenable to taking their Demurrer off calendar and allowing the City to file a first amended writ. Counsel for SDCERS so agrees. Counsel for SDCERS has the authority to act on behalf of SDCERS. Accordingly, the parties request that this Court grant the City leave to file an amended writ on or before April 30, 2008."

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6 Employees contend that two authorities establish that the four-to-one vote was legally insufficient: *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 519-520, and 61 Ops.Cal.Atty.Gen. 243 (1978 Cal. AG Lexis 53, *23). According to Employees, if SDCERS had not withdrawn its demurrer, the trial court in the *City of San Diego* Action would have relied on those authorities to decide that the City council's vote was legally insufficient to authorize Aguirre to pursue the action. The authorities cited by Employees are not squarely on point, and therefore do not conclusively resolve whether the City council's four-to-one vote was legally sufficient. It is not possible to know how the trial court in the *City of San Diego* Action would have ruled had SDCERS declined to enter into the stipulation with the City and instead pursued a demurrer challenging the legal sufficiency of the City council's four-to-one vote. Further, to resolve the instant appeal we need not, and do not, make any determination concerning the legal sufficiency of the four-to-one vote.

SDCERS then withdrew its demurrer, and the *City of San Diego* Action proceeded without challenge by SDCERS to Aguirre's authority to pursue to the first amended writ petition on behalf of the City.

In the causes of action for equitable relief from judgment in the *City of San Diego* Action in both the *Abbe* and *Abitria* complaints, Employees alleged that the City engaged in extrinsic fraud in connection with the stipulation because the City did not "inform[] the court that this four-to-one vote had occurred when the 'affirmative vote of five members of the Council' was required' " and it "presumably[] did [not] inform SDCERS's counsel." Employees alleged that the City's failure to inform the court and SDCERS's counsel about the legal insufficiency of the four-to-one vote, was "deceptive conduct constituting extrinsic fraud" which "wrongfully prevented SDCERS from pursuing its demurrer on the grounds that the writ petition was void for lack of City Council authorization and failed to state a proper cause of action due to the City Attorney's lack of standing." According to the Employees' allegations, "[h]ad the true facts not been concealed from SDCERS'[s] counsel and the court, SDCERS'[s] demurrer would have been sustained without leave to amend and no judgment would have been entered in City's favor and enforced thereafter by SDCERS in a manner adverse to [Employees]."

In the alternative, Employees alleged that SDCERS may have actually known "that the City Council had *not* in fact authorized the writ petition . . . , but chose nevertheless to abandon its demurrer and 'consent' to the writ petition being prosecuted in [the] City's name but without its authorization." Employees alleged that "such an act of

wrongful collusion with the City Attorney's Office would constitute separate and independent grounds for equitable relief against . . . judgment."

Based on either alleged circumstance (i.e., SDCERS's ignorance of the legally insufficient vote or its wrongful collusion with Aguirre to allow the *City of San Diego* Action to proceed), Employees contended that they were entitled to equitable relief against judgment in the *City of San Diego* Action. Specifically, they sought an order preventing the City and/or SDCERS "from taking adverse action" against Employees and "directing SDCERS to honor the 'window period' PSC contracts [Employees] originally signed as originally written and priced."

3. *Employees Do Not Successfully Plead a Cause of Action for Relief from Judgment Based on Extrinsic Fraud*

In the trial court, Employees argued that they had pled extrinsic fraud either by alleging that SDCERS was deceived by the City about the insufficiency of the four-to-one vote, *or* by the alternative allegation that SDCERS and Aguirre colluded to enter into the stipulation allowing the action to go forward despite their knowledge of the alleged insufficiency of the four-to-one vote. However, on appeal, Employees limit their extrinsic fraud argument only to the second circumstance.

Specifically, Employees state that "post-demurrer discovery had proven collusion between SDCERS and Mr. Aguirre — rendering moot their alternative pleading scenario that SDCERS had been deceived *by* Mr. Aguirre."[7] Employees claim that SDCERS

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7 Employees' evidence in opposition to the summary judgment motion established that after the City council's four-to-one vote and prior to the April 24, 2008 stipulation,

"collude[ed] with Aguirre to get his renegade Writ before the court by means of a false and fraudulent stipulation," and this constituted extrinsic fraud because "[b]oth SDCERS and the City Attorney's Office kept the Council's 4-to-1 vote — and the charter's unequivocal requirement of *five* affirmative votes — hidden from the court." According to Employees, "[t]he wrongful conduct of the only two parties to [the] *City of San Diego* [Action] in filing a false stipulation to induce the court's otherwise non-existent jurisdiction — to the detriment of *absent non-parties* — is precisely the type of *extrinsic fraud* equity is designed to remedy."

We begin by examining the legal principles governing equitable relief against judgment based on extrinsic fraud. "A party or one in privity with him who has been prevented from obtaining a fair adversary hearing through extrinsic fraud . . . may bring an equitable action to vacate the judgment. [Citations.] A stranger may maintain such an action if his interests have been adversely affected by the judgment." (*People v. Ryerson* (1966) 241 Cal.App.2d 115, 119 (*Ryerson*).)[8] "[O]nly upon proof of *extrinsic* and *collateral* fraud can plaintiff seek and secure equitable relief from the judgment."

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counsel for the City and counsel for SDCERS discussed the issue of whether the four-to-one vote was legally sufficient. The SDCERS Board then considered the *City of San Diego* Action in closed session in a meeting with legal counsel on April 18, 2008, leading to SDCERS and the City entering into the stipulation filed on April 24, 2008.

8 Among other arguments, the City contends that the cause of action for equitable relief from judgment based on extrinsic fraud lacks merit because Employees were not sufficiently impacted by the judgment in the *City of San Diego* Action to have standing to seek relief. As we conclude on other grounds that the demurrers were properly sustained, we accordingly need not, and do not, determine whether Employees established standing to seek relief.

(*Caldwell v. Taylor* (1933) 218 Cal. 471, 476.) " 'Extrinsic fraud is a broad concept that "tend[s] to encompass almost any set of *extrinsic* circumstances which deprive a party of a fair adversary hearing." . . . It "usually arises when a party . . . has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting [it's] claim or defense.' . . ." ' Intrinsic fraud, on the other hand, involves the introduction of perjured testimony or false documents or the concealment or suppression of material evidence in a fully litigated case." (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1531-1532 (*Parsons*), citations omitted.) "With regard to an attack on a judgment, the distinction between intrinsic and extrinsic fraud is of critical importance because intrinsic fraud cannot be used to overthrow a judgment, even where the party was unaware of the fraud at the time and did not have a chance to raise it at trial." (*Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 828.)

Employees' first theory of extrinsic fraud, which they are no longer pursuing, is premised on the City's alleged *concealment* from SDCERS of the fact that City council's vote was four-to-one and may have been legally insufficient. As the trial court properly determined, this allegation does not describe extrinsic fraud, as "[t]he concealment by a party of evidence which, if disclosed, would tend to overthrow his case is not extrinsic fraud." (*Burch v. Hibernia Bank* (1956) 146 Cal.App.2d 422, 432.) Instead, the City's purported concealment of facts that purportedly would have undermined its case are a classic example of *intrinsic* fraud.

As we have described, Employees' remaining theory of extrinsic fraud focuses on the allegation that the City and SDCERS entered into a collusive stipulation by agreeing

that the City council authorized Aguirre to pursue the writ petition. Employees rely on a series of cases in which nonparties to a litigation obtained equitable relief from a judgment that was obtained through the collusion of the parties, and which was obtained without the nonparty being able to protect its own interests. (*Ryerson*, *supra*, 241 Cal.App.2d 115; *Babbitt v. Babbitt* (1955) 44 Cal.2d 289, 293 (*Babbitt*); *Harada v. Fitzpatrick* (1939) 33 Cal.App.2d 453 (*Harada*); *Harkins v. Fielder* (1957) 150 Cal.App.2d 528 (*Harkins*).)[9] Citing this case law, Employees contend that when "fraudulent acts of colluding parties in a fully-litigated case operate to injure absent third parties, equitable relief is warranted" because "the colluding parties are practicing extrinsic fraud on the court as well as upon the third party." (Italics omitted.) As we will explain, the case law on which Employees rely is not applicable, as this is not a case in which it is alleged that the City and SDCERS colluded to obtain a specific judgment.

To address Employees' argument, we look to each of the cases on which Employees rely. As our examination will show, three of the cases on which Employees rely involve parties who colluded to obtain a judgment solely to obtain an advantage over a third party, not because of any bona fide dispute between the litigating parties.

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9 In their reply brief, Employees also rely on *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 Cal.App.4th 74, 94. That case concerned relief from a sister state judgment pursuant to Code of Civil Procedure section 1710.40 on the ground that the attorney in the sister state action purported to represent a party without authority to do so and in actual conflict with the representation of other parties in the litigation. The issues presented here do not concern an attorney conflict of interest or unauthorized representation, and we accordingly find the discussion in *Tsakos* to be inapposite.

(*Ryerson, supra,* 241 Cal.App.2d 115; *Babbitt, supra,* 44 Cal.2d 289; *Harada, supra,* 33 Cal.App.2d 453.) A fourth case involves the specific situation of a party's failure to inform the court of other potential heirs in a probate action, to prevent those parties from appearing to protect their interests. (*Harkins, supra,* 150 Cal.App.2d 528.)

In *Ryerson, supra,* 241 Cal.App.2d 115, the Public Utilities Commission (PUC) had ordered a common carrier to take action against a shipper that it had undercharged in violation of applicable rate tariffs. The carrier filed suit against the shipper, purportedly to recover the undercharges, but then entered into a collusive stipulation of facts with the shipper stating that parties mistakenly entered into the contracts that the PUC had found to violate the tariff rules. Based on that collusive stipulation, the court entered a judgment which reformed the parties' contracts to bring them into compliance with the applicable rate tariffs rather than requiring the shipper to pay the undercharges. Explaining that "a collusive judgment adversely affecting the rights of third persons may be set aside on the ground of extrinsic fraud" (*id*. at p. 121), *Ryerson* concluded that the PUC had been injured by the judgment that had been entered based on the party's collusive stipulation, justifying a cause of action for equitable relief from the judgment based on extrinsic fraud. (*Ibid*.)

In *Babbitt,* a husband bought real property with community funds but took title in the name of his cohabitating girlfriend. (*Babbitt, supra,* 44 Cal.2d at p. 291.) In a lawsuit later determined to be collusive, the girlfriend and husband then filed suit against each other to settle the issue of who owned the real property, stipulating to a judgment giving each of them one-half interest in the real property. (*Ibid*.) In a subsequent divorce

action, the wife obtained equitable relief from the judgment that gave partial ownership of the real property to the girlfriend. As *Babbitt* explained, the stipulated judgment was part of a "conspiracy . . . to deprive [the wife] of her property rights," and based on "the general rule that a judgment obtained in fraud of the interests of a third person is not binding upon him," the wife had properly obtained equitable relief from the judgment. (*Id*. at p. 293.)

In *Harada* a husband and wife, along with their son, colluded to modify an interlocutory divorce decree that had granted wife the ownership of certain farmland. (*Harada*, *supra*, 33 Cal.App.2d at p. 455.) The farmland was leased by wife to a tenant farmer, who planted the land with a valuable asparagus crop. (*Ibid*.) The tenant's lease provided that if the ownership of the farmland changed, the lease would be terminated. In a scheme to terminate the lease and gain control over the asparagus crop, husband and wife conspired to have the divorce decree modified to transfer ownership of the farmland to husband, with the result that the tenant farmer was ejected from the farmland. (*Id*. at p. 458.) The tenant farmer sued to obtain equitable relief from the judgment modifying the divorce decree. (*Id*. at p. 457.) *Harada* explained that husband and wife had conspired to defraud the tenant farmer by obtaining the modified divorce decree and "in consummating this conspiracy" had concealed relevant facts from the court concerning the tenant farmer's lease, which constituted extrinsic fraud on the court. (*Id*. at p. 459.) Stating that "[a] person, not a party to the action in which the extrinsic fraud is perpetrated, who is adversely affected by the judgment, may bring an action in equity to

vacate it[,] *Harada* affirmed the judgment affording the tenant farmer equitable relief from judgment. (*Ibid*.)

The final case on which Employees rely, *Harkins, supra,* 150 Cal.App.2d 528, is not a collusive judgment between parties, but is similar to the other three in that it involved a judgment adverse to a third parties' interests, obtained through concealment of relevant facts from the court and without the opportunity of the third parties to represent themselves. In *Harkins*, Oscar, an heir to an estate of his deceased brother, failed to notify the probate court about his out-of-state siblings who were also potential heirs, and distribution of the entire estate went to Oscar. (*Id*. at pp. 531-532.) After Oscar died, his siblings found out about the distribution to Oscar of the brother's entire estate and successfully sued to obtain their share of the brother's estate from the executor of Oscar's estate. (*Id*. at p. 533.) *Harkins* held that the siblings had a successful claim against Oscar's estate because Oscar had perpetrated extrinsic fraud upon them during the proceedings concerning the brother's estate. *Harkins* explained that one type of extrinsic fraud consisted of "deceptive conduct on the part of the distributee of an estate which has kept other interested parties away from court by some fraudulent artifice or willful suppression of material facts." (*Id*. at p. 535.) Oscar's failure to disclose the existence of his siblings "was fraud upon the court and upon [his siblings]" which had the "effect of depriving [the siblings] of notice of the hearing" and thus "constituted a species of extrinsic fraud." (*Id*. at p. 536.) Relief was warranted because Oscar's extrinsic fraud

"effectively prevented [the siblings] from protecting their interests in the estate of their brother." (*Id*. at p. 538.)[10]

None of the cases upon which Employees rely are applicable here. Employees' allegations do not describe a situation, as in *Ryerson*, *Babbitt* and *Harada*, where parties to a litigation entered into a collusive judgment to obtain an advantage over a third party. Here, the history of the *City of San Diego* Action shows that it was substantively and extensively litigated on the merits by SDCERS. As described in the *City of San Diego* Opinion, SDCERS opposed the City's petition on numerous grounds, and when unsuccessful in defeating the City's petition, it appealed the trial court's decision, asserting all of the arguments that we addressed in the *City of San Diego* Opinion.[11] In light of this background, there is no basis for an allegation that SDCERS and the City entered into a collusive judgment in the *City of San Diego* Action. Instead, all that

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10 As described in more recent authority, *Harkins* falls under an established line of cases holding that "the deliberate failure to notify the court of the existence of heirs, combined with the filing of a knowingly false petition, can constitute extrinsic fraud." (*Estate of McGuigan* (2000) 83 Cal.App.4th 639, 651, citing *Harkins, supra*, 150 Cal.App.2d at pp. 535, 537.) Under that line of cases, "if the petitioner fails to give notice to a genuinely *known* heir, he or she commits extrinsic fraud and the heir may maintain an action in equity for a constructive trust later." (*In re Estate of Carter* (2003) 111 Cal.App.4th 1139, 1148-1149, citing *Harkins, supra*.)

11 As we described in the *City of San Diego* Opinion, "SDCERS opposed the petition, arguing (1) because [the SDCERS Board's November 16, 2007] vote did not set additional [service credit] purchase rates, no duty was implicated by [San Diego Municipal Code] section 24.1312; (2) the [B]oard properly exercised its constitutional discretion to amortize the net actuarial deficiency because the City was responsible for the deficit by virtue of its retroactive retirement factor enhancements; (3) the case was barred by the statute of limitations; and (4) the City failed to join as parties the employees impacted by any favorable ruling." (*City of San Diego*, *supra*, 186 Cal.App.4th at p. 77.)

Employees are able to allege is that the City and SDCERS entered into a single stipulation near the beginning of the contested litigation, allowing the City to file a first amended writ petition, and reflecting SDCERS's decision not to challenge Aguirre's authority to pursue the *City of San Diego* Action. Employees' allegation that SDCERS intentionally gave up the possibility of pursuing a demurrer based on a challenge to the legal sufficiency of the City council's four-to-one vote does not describe a collusive *judgment* aimed at attacking absent parties' legal rights, and therefore Employees have not alleged the existence of extrinsic fraud based on a collusive judgment as described in *Ryerson*, *Babbitt* and *Harada*.

Further, *Harkins* is not applicable here. *Harkins* stands for the principle that it is extrinsic fraud to deliberately conceal information in order to avoid providing notice to a party whose rights are at stake in a litigation. (*Harkins*, *supra*, 150 Cal.App.2d at pp. 535-538.) As such, it is an illustration of the well-established principle that extrinsic fraud " ' "usually arises when a party . . . has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting [its] claim or defense.' " ' " (*Parsons*, *supra*, 31 Cal.App.4th at p. 1532.) Here, the act of entering into the stipulation did not serve to conceal any information from Employees in order to prevent them from protecting their legal rights.

In a related argument concerning purported concealment of facts by SDCERS, Employees argue that because SDCERS acts as a fiduciary for pension system participants, we should apply case law in which extrinsic fraud by fiduciaries gives rise to a ground for equitable relief from judgment. In setting forth the applicable rule, our

Supreme Court explained that a beneficiary may obtain equitable relief from judgment "when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him facts essential to the protection of his rights, even though such facts concerned issues involved in the case in which the judgment was entered" and under other circumstances would be classified as intrinsic fraud. (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 19.) The application of that rule does not advance Employees' argument, as Employees cannot allege that SDCERS concealed anything from them by entering into the stipulation with the City. On the contrary, the stipulation was a publicly available document filed as part of the *City of San Diego* Action, and the facts concerning the stipulation were available to the public, with the City reporting the four-to-one vote to the public and specifically pointing out that "[w]hether the 4-to-1 vote is binding on City is a legal question that may need to be resolved by a court."

In sum, the facts alleged by Employees do not constitute a basis for equitable relief from judgment based on extrinsic fraud. The trial court accordingly properly sustained SDCERS's and the City's demurrers to that cause of action in both actions.

B. *Summary Judgment on Breach of Fiduciary Duty Causes of Action*

We next consider Employees' challenge to the trial court's ruling granting summary judgment in favor of SDCERS on Employees' breach of fiduciary duty causes of action in the second amended complaints in *Abitria* and *Abbe*.

1. *The Breach of Fiduciary Duty Causes of Action*

The second amended complaints contained two causes of action for breach of fiduciary duty against SDCERS, both of which alleged breaches of a common law

fiduciary duty and a "constitutional-based fiduciary duty" under article XVI, section 17 of the California Constitution.

The first cause of action alleged that SDCERS breached its fiduciary duty to Employees by voting on November 16, 2007, to continue to charge the City for the underfunding of the PSC program. According to Employees, SDCERS's vote on November 16, 2007, served to restart the statute of limitations period for the City's challenge to SDCERS's practice of requiring the City to pay for the underfunding of the PSC program. Employees contend that the vote was a breach of SDCERS's fiduciary duty to Employees because the vote enabled the City to pursue the *City of San Diego* Action, eventually resulting in the *City of San Diego* Opinion and SDCERS's adoption of Rule 4.90, which allegedly harmed Employees.

The second cause of action alleged that SDCERS breached its fiduciary duty to Employees by two things it did during its defense of the *City of San Diego* Action. First, Employees contend that SDCERS should not have stipulated that the City council's vote authorized the lawsuit, and instead should have pursued a demurrer based on the theory that the four-to-one vote was not legally sufficient to authorize Aguirre to pursue the action; and, second, SDCERS should have raised affirmative defenses based on a plea in abatement or the rule concurrent jurisdiction, both of which would have been premised on the existence of the judgments already entered in the *Aguirre* litigation. Employees contend that if SDCERS had raised those specific affirmative defenses or had pursued the issue of the legal insufficiency of the four-to-one vote, it would have obtained a dismissal of the *City of San Diego* Action, and Rule 4.90 would not have been adopted.

The trial court granted summary judgment in favor of SDCERS on both breach of fiduciary duty causes of action. The trial court concluded that as a public entity, SDCERS was immune from liability for the alleged breaches of fiduciary duty under provisions of the Government Claims Act (Gov. Code, § 815 et seq.).[12]

2. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' " (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

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12 The trial court also ruled with respect to the first cause of action (which alleged that SDCERS improperly restarted the statute of limitations period) that there was no merit to Employees' contention that, had the November 16, 2007 vote not occurred, the statute of limitations would have barred the *City of San Diego* Action. As the trial court also granted summary judgment based on its conclusion that the first cause of action was barred by Government Claims Act immunity, and we affirm on that ground, we need not, and do not, consider the trial court's ruling on the statute of limitations.

3. *SDCERS Established That the Breach of Fiduciary Duty Causes of Action Were Barred by Government Claims Act Immunity*

SDCERS's summary judgment motion was based on the assertion that it was entitled to immunity for the acts alleged in the breach of fiduciary duty causes of action. We therefore begin with an overview of the legal basis for that argument.

a. *Legal Basis for Immunity Argument*

Within the Government Claims Act, the relevant statutory immunity applicable to SDCERS in this context is set forth in Government Code section 815.2, subdivision (b), which creates immunity for a public entity when its employees are immune from liability for the act or omission at issue. As set forth in that provision, "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (*Ibid.*; see also *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980 (*Caldwell*) [explaining that under Gov. Code, § 815.2, subd. (b) "public entities are immune where their employees are immune, except as otherwise provided by statute"]; *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 49 [to the extent that public pension system board had discretionary immunity, the public entity itself was also immune].) As SDCERS points out, the alleged breaches of fiduciary duty are based on acts by the SDCERS Board members, who are SDCERS employees, and thus to the extent the Board members are protected by immunity, SDCERS is as well.

Here, the immunity provision that applies to the individual SDCERS Board members is set forth in Government Code section 820.2. Under that provision, "[e]xcept

as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (*Ibid*.)

Our Supreme Court's case law has provided guidance on the type of decisions that fall under the discretionary act immunity set forth in Government Code section 820.2. Immunity under this provision "is reserved for those '*basic policy decisions* [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' . . . Such 'areas of quasi-legislative policy-making . . . are sufficiently sensitive' . . . to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process.' " (*Caldwell, supra*, 10 Cal.4th at p. 981, citations omitted.) In contrast, "there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated." (*Ibid*.)

The application of discretionary act immunity "requires a showing that 'the specific conduct giving rise to the suit' involved an *actual* exercise of discretion, i.e., a '[conscious] balancing [of] risks and advantages . . . .' " (*Caldwell, supra*, 10 Cal.4th at p. 983, citation omitted.) However, there is no requirement that the public employee's exercise of discretion be based on "a *strictly careful, thorough, formal, or correct* evaluation" because "[s]uch a standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy." (*Id*. at pp. 983-984.)

b. *Employees Contend SDCERS Is Not Immune Because the SDCERS Board Members Were Not Exercising Lawful Discretion*

Employees' first argument is that the SDCERS Board members were not performing discretionary acts in taking the actions that gave rise to the breach of fiduciary causes of action, namely, making a public announcement of their vote on November 16, 2007, to continue to charge the City of the underfunding of the PSC program, and deciding to enter into the Stipulation with the City in the *City of San Diego* Action and to forego certain affirmative defenses based on the judgment in the *Aguirre* litigation.

Employees' argument is focused on the assertion that the SDCERS Board did not have the "lawful discretion" to take the actions that it did. According to Employees, "legally significant events had stripped SDCERS of *discretion* with regard to the acts at issue and dictated instead what SDCERS'[s] ministerial duties were on November 16, 2007, in order to fulfill its article XVI, section 17 constitutional duties to plan members." Employees also claim that SDCERS "had no lawful discretion . . . to treat [Employees'] full, earned, vested pension benefits as if they were open to debate or subject to impairment or reduction." Regarding SDCERS's decisions during the litigation of the *City of San Diego* Action, Employees contend that SDCERS was not exercising lawful discretion because SDCERS purportedly "had a legally-mandated, ministerial duty to respond to Aguirre's Writ in a manner consistent with prior binding litigation events, and had no discretion to . . . induce judicial jurisdiction over Aguirre's unauthorized Writ by a false stipulation."

These arguments are not persuasive as part of the immunity analysis. By arguing that the Board's exercise of discretion was not "lawful," and that SDCERS purportedly therefore had a "ministerial" duty to act in a certain way, Employees are in substance arguing the *merits* of their breach of fiduciary duty claims, not presenting an argument as to whether SDCERS was engaging in discretionary, rather than ministerial, acts in reaching a decision on November 16, 2007, or making decisions during the *City of San Diego* Action.

Although Employees borrow the term "ministerial duty" as part of their argument, they do not properly address the immunity issue. The proper inquiry in an immunity analysis is whether the governmental actor acted in a discretionary manner or, instead, was merely fulfilling a ministerial duty, *not* whether a discretionary action was a *lawful* and *proper* exercise of discretion. (See *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 749 ["The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion' and we conclude that such decisions are immunized under [Government Code]section 820.2."].) As our Supreme Court has explained, immunity is "designed to protect against claims of *carelessness, malice, bad judgment, or abuse of discretion* in the formulation of policy," and therefore, "claims of *improper* evaluation cannot divest a discretionary policy decision of its immunity." (*Caldwell*, *supra*, 10 Cal.4th at pp. 983-984, first italics added.)

Here, the acts upon which Employees base their breach of fiduciary duty claims are discretionary policy-making acts, as they involve decisionmaking on basic policies

concerning how to fund the shortfall in the PSC program that had been created by the pricing of the PSC credits during the window period, and what strategy to take in the *City of San Diego* Action. These decisions were discretionary, and were not merely the carrying out of ministerial duties. First, the decision made at the November 16 meeting constituted an exercise of discretionary policymaking, as the City Charter gives the SDCERS Board the discretion to determine the funding obligations of the City for the pension plan (City Charter, art. IX, § 143), and the SDCERS Board was engaged in that function during the November 16 meeting when it determined how to proceed with funding the shortfall in the PSC program in light of Aguirre's attack on that program and threats of litigation. As we explained in the *City of San Diego* Opinion, the SDCERS Board was advised that it "could legally take several courses of action to remedy the underfunding, including 'voiding contracts,' 'collecting arrears payments,' 'offering rewritten contracts,' 'spreading out additional payments,' 'reducing benefit levels,' and 'continuing to collect the shortfall through the amortization of the system's unfunded liability,' " and it exercised its discretion as a policymaking body to continue to charge the City for the unfunded liability. (*City of San Diego, supra*, 186 Cal.App.4th at p. 77.)[13] Second, the SDCERS Board's decisions about how to proceed in the *City of*

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13 Employees contend that at the November 16 meeting, the SDCERS Board was not lawfully exercising the discretion given to it in the City Charter to determine the pension plan funding obligations of the City because, as of that date, it had already determined the City's annual funding obligation. We disagree. As we understand the purpose of the November 16 meeting, it was to decide, whether *going forward*, SDCERS would *continue* to charge the City on an annual basis for the underfunding of the PSC program.

San Diego Action were not mere ministerial actions, as making litigation decisions "necessarily requires a judgment based on an evaluation of the merits of the potential claim and possible defenses, as well as a cost-benefit analysis of the litigation" which " 'comprises the very essence of the exercise of "discretion" . . . immunized under [Government Code]section 820.2.' " (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 342 (*Nasrawi*).)

We therefore conclude that the acts at issue here — i.e., announcing a vote on November 16, 2007, to continue to require the City to pay for the underfunding of the PSC program, and making certain litigation choices during the *City of San Diego* Action, were discretionary acts within the meaning of the immunity provision in Government Code section 820.2.[14]

c. *The Breach of Fiduciary Duty Causes of Action Are Subject to Immunity Even Though They Are Based on Provisions in the State Constitution*

Employees next argue that the immunity in Government Code section 815.2, subdivision (b) does not bar the breach of fiduciary duty causes of action because they arise under provisions of the California Constitution that establish the fiduciary duties of

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Therefore, the decision was directly related to SDCERS's role of determining the City's annual funding obligations.

[14] In a variation on their argument that the SDCERS Board members were not exercising *lawful* discretion, Employees contend that there are disputed factual issues on that subject, precluding summary judgment. This argument fails for the same reasons we have set forth above. The proper inquiry is simply whether the SDCERS Board members were exercising discretion *at all*, not whether the exercise of discretion was *lawful*.

public pension boards. According to Employees, Government Claims Act immunity applies only when a tort claim is based on statutory or common law authority, but not when it is based on a constitutional provision.

As the basis for their claim that their breach of fiduciary duty causes of action arise under our state's Constitution, Employees rely on article XVI, section 17 of the California Constitution, which describes the fiduciary responsibilities of the members of a public pension board. In part that section provides:

> "Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:
>
> "(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.
>
> "(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.
>
> "(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters

> would use in the conduct of an enterprise of a like character and with like aims."

(Cal. Const., art. XVI, § 17.)[15] In short, this provision establishes that members of a public pension board, such as the SDCERS Board members, are fiduciaries; that they must exercise their fiduciary duties with the purpose, among others, of providing benefits to participants and their beneficiaries; and that the board members' duty to pension plan participants and beneficiaries takes precedence over any other duty. However, as relevant to the following discussion, the plain language of the provision says nothing about creating liability for money damages against public pension plan members in instances when such liability would otherwise be barred by statutory governmental immunity.

Employees rely primarily on the doctrine of constitutional supremacy to argue that their breach of fiduciary causes of action are not subject to Government Claims Act immunity because they arise under the Constitution. Under that doctrine, "it is well established that '[a] statute cannot trump the Constitution.' " (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 788; see also *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, 527 ["The California Constitution trumps any conflicting provision of the Family Code."].) As stated in the case law upon which

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15 The current version of article XVI, section 17 of the California Constitution was put in place as a result of Proposition 162 (The California Pension Protection Act of 1992) "to 'insulate the administration of retirement systems from oversight and control by legislative and executive authorities' . . . , and to protect retirement boards from ' " 'political meddling and intimidation.' " ' " (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 226, fn. 8, citation omitted.)

Employees rely, "It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state." (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28.)

The doctrine of constitutional supremacy does not apply here because Employees have not identified any conflict between the constitutional provisions and the Government Claims Act immunity provisions. As we have explained, the constitutional provisions we have cited above merely establish that public pension board members have certain fiduciary duties to participants and beneficiaries, but those provisions do not address whether beneficiaries and participants have the right to recover monetary damages from pension board members who breach those duties. Therefore, no constitutional provision is "trumped" when Government Claims Act immunity is applied to bar liability for monetary damages based on the SDCERS Board members' alleged breach of fiduciary duty.

As SDCERS points out, there *are* instances — such as in suits for inverse condemnation — where the Constitution specifically provides for a monetary remedy against a public entity that trumps any Government Claims Act immunity that might otherwise apply. Indeed, the legislative committee comments to Government Code section 815, which sets forth the general rule of immunity for public entities, acknowledges that in some instances, such as inverse condemnation, constitutional

provisions will trump Government Claims Act immunity.[16] "This section abolishes all common law or judicially declared forms of liability for public entities, *except for such liability as may be required by the state or federal constitution*, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable." (Legis. Com. com.—Sen., 32 pt. 1 West's Ann. Gov. Code (2012 ed.) foll. § 815, p. 215, italics added.) Here, because the constitutional provisions at issue do not expressly create a monetary remedy for breach of fiduciary duty against public pension board members, this is not a case, such as inverse condemnation, where the Constitution *requires* liability and therefore trumps Government Claims Act immunity provisions.

The parties extensively cite *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300 (*Katzberg*) in their discussion of the immunity issue. However, *Katzberg* is not relevant here. In *Katzberg*, our Supreme Court set forth the proper approach for deciding whether a state constitutional provision gives rise to a private right of action for damages. (*Id*. at p. 317.) Specifically, the issue in *Katzberg* was whether a plaintiff could sue for monetary damages based on a violation of the due process liberty right in the state Constitution. Applying the specific multi-step approach set forth for the first

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16 Regarding inverse condemnation, the California Constitution provides in part: "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19, subd. (a).)

time in *Katzberg*, our Supreme Court concluded that no private right of action for damages existed for violation of the constitutional due process liberty right.[17] (*Katzberg*, at p. 329.) The parties did not raise, and *Katzberg* did not discuss, whether Government Claims Act immunity might apply to the conduct that gave rise to the lawsuit. Accordingly, *Katzberg* has no relevance to determining the circumstances under which a constitutional provision might trump Government Claims Act immunity.

Katzberg is inapplicable here for a second reason. Specifically, our Supreme Court in *Katzberg* was careful to limit the applicability of its constitutional tort analysis to instances in which a plaintiff was seeking monetary damages for commission of a constitutional tort that was not otherwise based on a tort that was already established by common law or by statute. Specifically, *Katzberg* stated that it was addressing *only* the issue of how to determine "whether an action for damages is available to remedy a constitutional violation that is *not tied to an established common law or statutory action*" and was *not* considering "actions . . . based upon grounds established under common law tort principles." (*Katzberg, supra*, 29 Cal.4th at p. 303, fn. 1, italics added.) Here, a

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17 The approach involves the following steps: (1) making an inquiry as to "whether there is evidence from which we may find or infer, within the constitutional provision at issue, an affirmative intent either to authorize or to withhold a damages action to remedy a violation;" (2) if that does not resolve the question, making an inquiry regarding several factors, including "whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision;" and (3) if those factors favor recognizing a constitutional tort, taking the final step of considering "the existence of any special factors counseling hesitation in recognizing a damages action." (*Katzberg, supra*, 29 Cal.4th at p. 317.)

cause of action for breach of fiduciary duty is an established common law tort, with the state constitutional provision simply serving to clarify the nature of the fiduciary duty applicable to public pension board members. Therefore, the analysis set forth in *Katzberg* for determining whether a private right of action for damages exists is not applicable here.

As further support for their argument that Government Claims Act immunity does not apply to the breach of fiduciary causes of action alleged here, Employees rely on a statement by our Supreme Court in *Lexin, supra*, 47 Cal.4th 1050. *Lexin* was an appeal in a criminal proceeding against several former members of the SDCERS Board, in which they were charged with violating state conflict of interest statutes (Gov. Code, § 1090 et seq.). (*Lexin*, at p. 1062.) *Lexin* concluded that the criminal informations should be set aside as to most of the board members, but made a comment at the end of the opinion, in dicta, explaining that even though the board members could not be criminally prosecuted, other avenues existed to address the type of misconduct alleged. "In closing, we note that, the applicability of [Government Code] section 1090 aside, a wealth of other legal remedies exists to ensure municipalities and retirement boards do not abuse the public trust. Both groups are subject to actions for declaratory relief or mandamus challenging their decisions . . . , as the City and SDCERS Board were sued here. Retirement board trustees are fiduciaries (Cal. Const., art. XVI, § 17) and as such are subject to suit for breach of fiduciary duty when their decisions fall short of the standard the law demands. We express no opinion as to whether the Lexin defendants

breached their fiduciary duties here, nor whether they might otherwise have been subject to civil liability for their actions." (*Lexin*, at p. 1102, citations omitted.)

Employees argue that by stating in *Lexin* that public pension plan board members are fiduciaries under article XVI, section 17 of the California Constitution and "as such are subject to suit for breach of fiduciary duty" (*Lexin*, *supra*, 47 Cal.4th at p. 1102), our Supreme Court was indicating that the SDCERS Board members would not be protected by Government Claims Act immunity in such a suit. We disagree. *Lexin* does not mention the issue of immunity, and there is no indication that our Supreme Court even considered the issue when stating that the SDCERS Board members were subject to suit. Indeed, our Supreme Court specifically clarified that it was expressing no opinion on "whether the Lexin defendants . . . might otherwise have been subject to civil liability for their actions" (*ibid.*), strongly implying that it had *not* considered whether immunity might apply to the specific conduct at issue.

Finally, we note that our decision is consistent with the only other published authority to consider the issue of whether Government Claims Act immunity applies to constitutionally-based breach of fiduciary claims against public pension plan members. In *Nasrawi*, *supra*, 231 Cal.App.4th 328, beneficiaries of a county employees pension trust brought suit against the public pension association, alleging that the association breached its fiduciary duty to them by failing to file a lawsuit against actuaries whose negligence allegedly caused the pension trust to be underfunded. *Nasrawi* concluded that the breach of fiduciary duty claims were barred by Government Claims Act immunity (Gov. Code, §§ 815, 815.2, 820.2) because the association's board members exercised

their discretion in deciding whether to file suit against the actuaries. (*Nasrawi*, at pp. 342-343.) As do Employees here, the plaintiffs in *Nasrawi* argued that "because they allege a constitutionally based duty, [the court] should not consider the question of immunity," and contended that "the immunity question" was "answered by the mere fact that the Constitution is the source of the duties at issue." (*Id*. at p. 341.) *Nasrawi* rejected the argument, explaining that "[u]ndoubtedly, the board owes fiduciary duties under [California Constitution, article XVI,] section 17, but whether it is immune from alleged violations of those duties is a separate question." (*Nasrawi*, at p. 341.) Consistent with our conclusion here, *Nasrawi* explained that plaintiffs had not identified any authority that supported their contention that "public entity employees are liable for injuries caused by their *discretionary* acts or omissions that violate *constitutionally* imposed duties." (*Id*. at p. 342, italics added.)

d. *Employees' Contention That They Seek Equitable Relief For the Breach of Fiduciary Duty Causes Action Does Not Succeed In Rescuing Those Claims From the Immunity Bar*

In another challenge to the applicability of Government Claims Act immunity to their breach of fiduciary duty causes of action, Employees contend that those causes of action are not barred by Government Claims Act immunity because they seek relief that is not monetary.

Employees rely on section 814 of the Government Code, which states that nothing in the Government Claims Act immunity provisions "affects liability based on contract or the right to obtain relief *other than money or damages* against a public entity or public employee." (Gov. Code, § 814, italics added.) Under this provision, therefore, immunity

does not apply unless Employees are seeking relief other than money or damages in their breach of fiduciary duty causes of action.

Employees contend that they are not merely seeking monetary damages for their breach of fiduciary causes of action because they also included a prayer for equitable relief in their pleadings.[18] Specifically, the second amended complaints in *Abbe* and *Abitria* seek the following relief for the breach of fiduciary duty causes of action: "past and future economic damages"; the "payment of money"; and "an order setting aside SDCERS'[s] acts." The first and second categories of relief clearly fall under the category of a claim for "*money or damages*" (Gov. Code, § 814, italics added), and thus recovery is barred by Government Claims Act immunity provisions. The third category of relief ("an order setting aside SDCERS'[s] acts") does not, on its face, require a payment of money or damages. However, as we will explain, that prayer for relief lacks any meaningful substance in the context of this case, and thus cannot serve as a basis for avoiding the application of Government Claims Act immunity for the breach of fiduciary duty causes of action.

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[18] Employees specifically contend that equitable relief is permitted as a remedy for breach of fiduciary duty, as set that remedy is expressly allowed by the common law and Probate Code section 16420, subdivision (a). We need not, and do not, express an opinion on the source or availability of equitable relief for breach of fiduciary duty here, or the applicability of the Probate Code. (Cf. Prob. Code, § 82, subd. (b)(13) [excluding from the definition of "Trust" in the Probate Code, a trust "for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind"].)

Although Employees pray for "an order setting aside SDCERS'[s] acts," nowhere in their pleadings or their briefing do they explain what acts they are seeking to set aside, other than that they are seeking to " 'set aside' SDCERS'[s] acts in breach of trust." However, as a matter of logic, it would either be impossible or of no use to Employees to set aside the acts that purportedly constituted the breaches of fiduciary duty. Those acts are alleged to be (1) SDCERS's announcement of its vote at the November 16, 2007 meeting to continue to charge the City for the underfunding of the PSC program; and (2) SDCERS's decisions during the litigation of the *City of San Diego* Action. Employees would gain nothing if those acts were set aside. Accordingly, there is no substance behind Employees' vague contention that they are seeking "an order setting aside SDCERS's acts" as a remedy for the breach of fiduciary duty causes of action. As the only substantive relief sought by Employees is monetary relief or damages, Government Claims Act immunity applies. (See *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 460 [in an action alleging improper termination or demotion against the county, the court rejected plaintiffs' contention that they sought injunctive relief, and their claims were therefore not subject to Government Claims Act immunity, as plaintiffs "fail[ed] to specify what injunctive relief they seek," and an injunction to provide them with their previous jobs was impossible, as those positions had been eliminated, so that plaintiffs' action was "primarily for money or damages, not injunctive relief"].)[19]

19 Although Employees do not articulate their claim as such, to the extent that

4. *The Trial Court Did Not Prejudicially Err in Sustaining an Evidentiary Objection in Ruling on the Motion for Summary Judgment*

As part of their opposition to SDCERS's summary judgment motion, Employees submitted a January 2004 memorandum prepared by outside counsel for the City, Timothy Pestotnik, providing a status report to the City council and the mayor on a class action lawsuit filed against SDCERS and the City (the Pestotnik memo).[20] Employees contend that the Pestotnik memo is significant to their argument that the statute of limitations would have barred the *City of San Diego* Action had the SDCERS Board not voted on November 16, 2007, to continue its practice of charging the City for the underfunding of the PSC program. Specifically, Employees argue that the Pestotnik memo shows that City leaders were on notice as of January 2004 that SDCERS had underpriced PSC program credits, and the City believed that practice was unlawful under the San Diego Municipal Code.[21]

Employees may be seeking an equitable remedy in the form of an injunction requiring SDCERS to allow them to retain the service credits they purchased during the window period without the payment of any additional funds, as SDCERS required in Rule 4.90, that relief would, *in substance* provide monetary relief to Employees, and would be barred by statutory governmental immunity. (See *Schooler v. State of California* (2000) 85 Cal.App.4th 1004, 1014 [rejecting plaintiff's argument that he was seeking injunctive relief, not damages, and thus was not subject to immunity, as that equitable relief would create financial burdens for the public entity, and observing that "the type of relief covered cannot circumvent the underlying policies behind the governmental tort liability for money damages"].)

[20] The lawsuit, which we do not otherwise discuss here, was *Gleason v. San Diego City Employees Retirement System*, San Diego Superior Court, case No. GIC803779.

[21] As relevant here, the Pestotnik memo states that "City leaders have taken note of the fact that SDCERS has apparently failed to collect the full cost from employees who

SDCERS objected to the admission of the Pestotnik memo on the basis that it was irrelevant, lacked foundation and contained hearsay.[22] The trial court sustained the objection on the ground of hearsay.

Employees contend the Pestotnik memo should not have been excluded as hearsay because it was not submitted for the purpose of establishing the truth of the matters discussed in it, but rather to show that the City had notice or knowledge of SDCERS's unlawful practices with respect to the pricing of PSC program credits. Employees rely on the principle that "[a]n out-of-court statement is not hearsay if offered to show the *effect* on the hearer, reader or viewer rather than to prove the truth of the content of the statement — e.g., that a party had prior *notice* or *knowledge*; that a party was given a *warning*; or to prove a party's *motive*, *good faith*, *fear*, etc. (where such notice, knowledge, motive, fear, etc. is *relevant* to an issue in the case)." (Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 8:1049, p. 8D-13.) We apply an

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elect to participate in the 'purchase of service credits' benefit. . . . [T]he City believes the Municipal Code requires the SDCERS Board to set the purchase price so that the purchase of service credit would be cost neutral to the retirement system. SDCERS has allowed city employees to contribute at a considerable discount, which results in a significant actuarial loss. Even after recognizing the problem, SDCERS allowed city employees to continue purchasing service credits at a discount, which generated further losses."

22 Attorney-client privilege was not an issue with respect to the admissibility of the Pestotnik memo, as the parties apparently did not contest that the privilege had been waived.

abuse of discretion standard of review in determining whether the trial court erred in sustaining SDCERS's objection.[23]

We conclude that the trial court properly sustained the objection on the ground of hearsay. " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) As Employees explained the relevance of the Pestotnik memo, it was to establish the *truth* of Pestotnik's statement that City leaders *believed*, as of January 2004, that SDCERS had acted *unlawfully* with respect to the pricing of the PSC program credits. The Pestotnik memo does not purport to provide *notice* of the illegality of the pricing of the PSC program credits, but rather to describe an already-existing belief purportedly held by City leaders on that subject. Therefore, the statements in the Pestotnik memo which describe the beliefs of City leaders about the illegality of the pricing the PSC program credits as of January 2004 were properly excluded because they are hearsay.

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23 Although our Supreme Court recently expressly declined to reach the issue in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, the weight of authority, both before and after *Reid*, holds that an appellate court applies an abuse of discretion standard when reviewing a trial court's rulings on evidentiary objections made in connection with a summary judgment motion. (See, e.g., *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852; *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 143-144; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82-83; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 (*Carnes*).) Even were we to apply a de novo standard of review to the trial court's evidentiary ruling, we would still conclude that the trial court properly sustained the objections. (See *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114 [explaining that under any standard of review it would reach the same conclusion regarding the trial court's ruling on evidentiary objections made in connection with a summary judgment motion].)

In addition, Employees' argument that the trial court erred in excluding the Pestotnik memo is without merit because Employees have not established any prejudice from the ruling. To present a successful challenge to an evidentiary argument on appeal, an appellant must show that the evidentiary error was prejudicial, amounting to a miscarriage of justice. (*Carnes*, *supra*, 126 Cal.App.4th at p. 694; Cal. Const., art. VI, § 13.) Here, the Pestotnik memo was submitted by Employees to establish the *merits* of their claim that SDCERS breached its fiduciary duty by not asserting a statute of limitations defense to the *City of San Diego* Action. However, as we have explained, because that claim is barred by SDCERS's Government Claims Act immunity, the merits of the breach of fiduciary duty claim are not relevant here. Accordingly, Employees cannot establish that they were prejudiced by the exclusion of the Pestotnik memo because it relates to an issue that was not dispositive in the ruling on the summary judgment motion.

DISPOSITION

The judgments are affirmed.

IRION, J.

WE CONCUR:

MCINTYRE, Acting P. J.

O'ROURKE, J.